

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 14 of 1992
WITH
CIVIL APPLICATION NO. 173 OF 1992
WITH
CIVIL APPLICATION NO. 516 OF 1992
WITH
CIVIL APPLICATION NO. 11592 OF 2010
WITH
CIVIL APPLICATION NO. 15050 OF 2015

1. Dattatraya Manoharrao Deshmukh,
Age 74 years, occup. Agriculture,
Resident of Kallam, Taluka Kallam,
District Osmanabad, deceased,
through legal representatives :-
 - 1/A) Bhaskar Dattatray Thakur (Deshmukh)
Age 70 years, occup. Pensioner,
R/o 38 Sai-Park, Mhada Colony,
R-43-N-7m Cidco, Aurangabad
 - 1/B) Dinesh Dattatray Thakur (Deshmukh),
Age 65 years, occup. Pensioner,
R. No. 7, Shubham Park, Cidco, Nashik
 - 1/C) Sou. Mangala Murlidhar Parlikar,
Age 65 years, occup. Household,
R/o Tirumala Mangal Karyalay,
in front of Pundlik Nagar, Aurangabad
 - 1/D) Dnyanoba Jyotiram Yadav,
Age 70 years, occup Agri./Pensioner,
R/o Mouje Pimpalgaon Dola,
Tq. Kallam, Dist. Osmanabad

1/E) Smt. Kantabai Dnyanoba Yadav,
Age 65 years, occup. Household,
R/o as above

1/F) Sanjay Dnyanoba Yadav	... Appellants/
Age 35 years, occup. Agril,	Deceased appellant
R/o as above.	No.1-orig.Deft No.2

VERSUS

1. Haribhau alias Harba s/o Nivrutti (Ingole)
died, through legal representatives :-

1/A) Babu Haribhau, Ingole,
Age 45 years, occup. Agril

1/B) Uttareshwar Haribhu Ingole,
Age 40 years, occup. Agril.,

1/C) Sau. Taramati Limbraj Mulik,
Age 32 years, occup. Household,
R/o A/P Satefal, Tq. Kaij, Dist. Beed

1/D) Sau. Bai Anant Warpe,
Age 35 years, occup. Household,
R/o Massa, Khandeshwar,
Tq. Kallam, Dist. Osmanabad

2. Pralhad Nivrutti Ingole,
since deceased, by his legal
representatives :-

2-A) Sahebrao Pralhadrao Ingole,
Age 28 years, occup. Agril.,

2-B) Rajendra alias Rajabhau Pralhadrao
Ingole, Age 22 years, occup. Agril.,
Both r/o Pimpalgaon (Dola),
Tq Kallam, Dist. Osmanabad

2-C) Vimalbai Ashruba Shinde,
Age 24 years, occup. Household,
R/o Kothala, Taluka Kallam,
District Osmanabad

2-D) Hirkanbai Pralhadrao Ingole,
Age 48 years, occup. Household,
R/o Pimpalgaon (Dola),
Tal. Kallam, District Osmanabad

3. State of Maharashtra,
Through Collector, Osmanabad

4. Babasaheb s/o Rambhau Pawar,
Age 34 years, occup. Agril.,
R/o Pimpalgaon (Dola),
Tal. Kallam, Dist. Osmanabad

5. Rambhau s/o Nivrutti Ingole, Age 59 years, occup. Agril. R/o Pimpalgaon, Tal. Kallam, Dist. Osmanabad	.. Respondents/Resps. No.1 & 2 orig. Pltffs. No.1 & 2, and Resps. No. 3,4 5 orig.defts. No.1,3 and 4
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Mr. P. R. Katneshwarkar, Advocate for appellants No.1A to 1C
Mr. Rajdeep Raut, Advocate for appellants no. 1D to 1F
and for applicants in Civil Application No. 15050 of 2015
Mr. S.S. Choudhari, Advocate for respondents no. 1A and 1C
Mrs. R. K. Ladda, Asstt. Govt. Pleader for respondent no. 3
Mr. A.R. Tapse Advocate h/f Mr. D.N. Suryawanshi, advocate
for respondent no. 4

CORAM : SUNIL P. DESHMUKH, J.
17TH DECEMBER, 2015

ORAL JUDGMENT :

1. This is defendant no. 2's second appeal taking exception to the judgment and decree of appellate court (District Judge, Osmanabad) in regular civil appeal no. 43 of 1994 delivered on 25-11-1991 reversing decision given by trial court (Civil Judge, Senior Division, Osmanabad) on 31-08-1983 in special civil suit bearing No.16 of 1981 filed by present respondents no. 1 and 2 and their mother Laxmibai, granting in favour of plaintiffs decree of declaration of ownership and possession of disputed red colour portion of lands and of declaration and injunction in respect of blue portion of land shown in sketch map annexed to the plaint.

2. After hearing learned advocates for quite some time, following questions of law appear to substantially arise in the present matter.

Whether, suit instituted by plaintiffs is within 12 years from occupation of defendants as claimed to have been running adverse to the title to the red colour area suit property acquired by predecessor of plaintiffs ?

3. Special Civil Suit No.16 of 1981 was instituted by predecessor of respondents No. 1/A to 1/D and 2/A to 2/D and

one Laxmibai [Plaintiffs no. 1, 2 and 3 respectively] against the State of Maharashtra [defendant no.1] deceased appellant [defendant No. 2] and two others – respondents No.4 and 5 [defendants No. 3 and 4] in the court of Civil Judge, Senior Division, Osmanabad, seeking declaration of ownership rights in respect of lands situated at village Pimpalgaon (Dola), Taluka–Kallam, Dist. Osmanabad, referred to in the claim clause and in the prayer clauses along with other reliefs claimed. Possession of land shown in red colour in the sketch map annexed to the plaint had been prayed for. The area in blue colour was claimed to be in possession of the plaintiffs and as such, declaration of ownership and injunction in respect of the same had been sought.

4. Plaintiffs' case in brief is that all the lands in the suit were leased out to their predecessor Nivrutti, who happened to be father of plaintiffs No.1 and 2 and defendant No.4 and husband of plaintiff No.3, long before the enforcement of the Hyderabad Tenancy and Agricultural Lands Act, 1950 ("Tenancy Act"). According to the plaintiffs, Nivrutti was in possession of the disputed lands as protected tenant on 1st September, 1957 and had been declared owner in respect of land shown in blue colour under section 38E of the Tenancy Act. On enforcement of the Hyderabad Inam Abolition and Cash Grants Act, 1954 ("Inam

Act”), *Inam* stood abolished on 20th July, 1955 and the lands stood vested in the government. Nivrutti was then in possession of the disputed lands as tenant. Under the provisions of Inam Act, him being in possession particularly on 1st July, 1960, he was given occupancy rights thereupon deceased Nivrutti had paid entire amount of occupancy price around 1965.

5. Predecessor of present appellant – original defendant No.2 Dattatraya had initiated proceedings against Nivrutti under section 44 read with section 32 of the Tenancy Act for resumption and possession of lands shown in red colour for his personal cultivation. Plaintiffs contend that, however, he could not secure possession till the notified date under Inam Act i.e. 1st July, 1960, and yet possession came to be delivered of the disputed red colour land to defendant No.2 on 20th April, 1961 under the order of Tahsildar, Kallam dated 13th April, 1961.

6. Grant of occupancy rights in favour of deceased Nivrutti had been proceeded against, by defendant No.2. The objection to occupancy right at the behest of defendant No.2 had been overruled by Tahsildar, Kallam. Appeal therefrom at his instance before Revenue Tribunal failed and writ petition by deceased respondent – defendant No.2 bearing No.1452 of 1966 came to be dismissed on 10th January, 1970.

7. Nivrutti died on 27th September, 1979 leaving behind plaintiffs and defendant No.4 as his legal heirs. In the meanwhile, defendant No.3 had been inducted by defendant no. 2 into possession of about 4 acre land from survey No.38/A falling in red colour in the sketch map annexed to the plaint. Defendant No.3 had been in possession of the land.

8. Since the plaintiffs were entitled to possession of the land and defendants being in illegal possession thereof, the plaintiffs asked the defendants for possession from them. However, defendants in response denied the claim and refused to hand over possession. In the circumstances, suit ensued.

9. The defendants were served. The matter was proceeded with against State of Maharashtra without written statement.

10. Defendant No.2 resisted the suit, denying averments made in the plaint. It was denied that the land was ever leased out to deceased Nivrutti or he was a protected tenant. It is denied that Nivrutti was declared occupant of the disputed land upon grant of occupancy rights referred to in sections 5 and 6 of Inam Act, contending that disputed lands are *Deshmukh Inam* lands and as such fall in category of *Watan* land. It is contended in the written statement that Nivrutti cannot be deemed to be in possession of disputed land as on 01-07-1960 in the capacity of

a tenant or had ever been in lawful possession thereof. Long before 01-07-1960, proceedings were initiated under section 32 of the Tenancy Act preceded by a notice under section 44 of said Act to Nivrutti. Tenancy, if any, of Nivrutti stood terminated before 01-07-1960 rendering the declaration of occupancy rights in favour of Nivrutti without any legal efficacy and not being valid. Defendant no. 2 had even contended that plaintiff's possession over the blue colour area shown in the sketch map was wrongful. Defendant is in continuous possession of red colour portion of land since 20-04-1961 and thereafter defendant no. 3 has been put in possession of an area of 4 acre from said red colour portion through a sale deed executed by defendant no. 2 in his favour. Defendants have come in possession of the land under due process of law, pursuant to decision in valid proceedings and as such it cannot be termed as wrongful dispossession of the plaintiffs. There is a clear and unambiguous admission by the plaintiffs about them being not in possession of red colour land since 20-04-1961. Since then, continuously, openly, without any interruption and to the knowledge of the plaintiffs, defendant no. 2 is in possession of said red colour portion of land. The plaintiffs, as such, have lost all rights in the land including right to claim back possession. They are not entitled to any relief in respect of said land.

Defendant no. 2 has thus perfected his title to the same by adverse possession. The suit instituted by plaintiffs is outside the prescribed period of limitation. It was being denied that there was ever any demand by plaintiffs for possession of the land. It was also denied that there had been any obstruction by defendants to plaintiff's possession over the blue colour area of the land. Plaintiffs had no cause of action to institute the suit.

11. Defendant no. 3 as well in his written statement, contended that the plaintiffs had knowledge about execution of registered sale deed in 1974 in his favour by defendant no. 2 in respect of 4 acre area from red colour portion of the land and about his possession over the same since then. Contended cause of action for institution of suit due to alleged obstruction is fallacious and imaginary. Possession obtained by defendant no. 3 over the portion under sale deed is lawful and plaintiffs would not be entitled to possession of the same. It has been pointed out in the written statement that the plaintiffs had not claimed any relief in respect of cancellation of sale deed executed by defendant no. 2 in defendant no. 3's favour.

12. Upon aforesaid pleadings, various issues had been framed by the trial court, relevant to the present controversy, however, are in respect of title to the suit properties, acquisition of title by defendant no. 2 to red colour area property by adverse

possession, and whether the suit is barred by limitation as also whether the plaintiffs are entitled to recovery of possession.

13. Trial court has considered that Nivrutti had been in possession of disputed land as a tenant with reference to certain documents like *Khasra Patra* at Exhibits - 57 to 60 and has further observed that pursuant to resumption of land in proceedings under sections 32 and 44 of the Tenancy Act, defendant no. 2 had been put in possession. It has further been referred to by the trial court that defendant no. 2 himself has admitted that Nivrutti was protected tenant of the disputed portion and that blue colour area of 8 acre 7 *guntha* had been declared in favour of Nivrutti under section 32E of the Tenancy Act.

14. As far as proceedings for occupancy rights under Inam Act are concerned, trial court discussed the decision relied on by defendant no. 2 in *Dattatraya vs. Ganpati, 1965-67 B.L.R. 521* wherein it has been held that tenancy of the tenant stands terminated on the date on which the land holder makes an application for possession of land to the tahsildar as provided under sub section 2 of section 44 of the Tenancy Act. Relying on said decision, contention of defendant no. 2 was that, the possession over red colour portion by Nivrutti on 01-07-1960 cannot be considered

as that of *Kabije Kadim* i.e. permanent tenant in occupation or tenant from the *inamdar* and it is the *inamdar* who is to be deemed to be occupant of red colour portion.

15. Countering aforesaid contention of defendant no.2, plaintiffs had relied on decision in the case *Rangnath vs. Daulatrao*, *AIR 1975 SC 2146*, in which it has been observed that mere service of notice and filing application by *inamdar* against tenant does not automatically terminate tenancy unless it culminates into direction by the competent authority for delivery of possession to the land holder.

16. With reference to aforesaid decision of supreme court, the trial court considered that on 01-07-1960, Nivrutti had been in possession of red colour portion and as such had been rightly declared as occupant and that the orders passed in tenancy proceedings would be rendered without jurisdiction.

17. The trial court went on to observe that since Nivrutti had been dispossessed from red colour portion on 20-04-1961, defendant no. 2 since then had been in continuous and uninterrupted possession thereof to the knowledge of the predecessor of plaintiffs and additionally defendant no. 2 having parted with four acre portion out of red colour area in favour of

defendant no. 3 on 10-05-1974 and plaintiffs having not taken any action for possession of red colour portion, in the face of continuous denial by defendant no. 2 of title of the plaintiffs over red colour portion and inaction on their part for possession, it has been considered by trial court that with efflux of time of twelve years, defendant no. 2 had become owner by adverse possession. His possession over red colour portion land in the interregnum had been tacked with character of adverse possession. Since the suit had been instituted on 23-11-1981 i.e. after expiry of period of twelve years from 20-04-1961 the same has been held to have been barred under the law of limitation and in the process plaintiffs' title to the property got extinguished. The trial court as such considered that defendants no. 2 and 3 are entitled to the property in red colour by adverse possession. The court, as referred to above, considered claim of title to the red colour area to be untenable. The trial court held in respect of red colour area of the land that defendant no. 2 has become owner by adverse possession and that suit is barred being beyond prescribed period of limitation holding plaintiffs to be not entitled to possession of said portion.

18. The trial court found that the plaintiffs are owners in possession of blue colour area and as such injuncted defendants. The suit as such was partly decreed.

19. The matter was taken up in appeal by the plaintiffs, under regular civil appeal no. 43 of 1984. The appellate court had framed points for determination, *inter alia*, that whether the plea of adverse possession over red colour area is available to defendant no.2; whether defendant no. 2 proves that he acquired title to the red colour area by adverse possession; whether plaintiffs are entitled to declaration of title and possession of red colour area.

20. The appellate court appears to have gone on the footing that it cannot be said that defendant no. 2 had validly set up hostile title against its real owner which is the State government, the land having been vested in the government by operation of Inam Act and in the circumstances, defendant no. 2 cannot claim title by adverse possession. The appellate court additionally considered even otherwise, as far as government lands are concerned, the period required for acquiring title by adverse possession is thirty years which in present case cannot be said to have been completed on the date of the suit which is lodged on 23-11-1981. Appellate court has considered that order by tahsildar granting possession to *inamdar* / defendant no. 2 is not justifiable having regard to that deceased Nivrutti was protected tenant much prior to enforcement of Inam Act and

subsequently had been declared as occupant and as such is a deemed owner of said land.

21. The appellate court has considered that in the present matter, the provisions of Inam Act were made applicable to the *inam* lands and *inams* were abolished on 20-07-1955 and as on 01-07-1960, Nivrutti had been in possession. Nivrutti had been declared occupant and had been directed to pay occupancy price of the land. Accordingly he had paid the same on 08-06-1965 and 29-06-1965. The appellate court with reference to sections 36, 38 and 38E of the Tenancy Act has considered that possession of red colour portion had been delivered to defendant no. 2 on 20-04-1961 under the orders of the tahsildar dated 13-04-1961 but said possession would not have a valid basis.

22. With reference to decision in *Rangnath vs. Daultrao*, AIR 1975 SC 2146 supra, the appellate court considered that the question which is required to be gone into in the present matter directly and substantially had been involved under said authoritative decision and considered that even though the land holder had initiated proceedings for resumption of possession of land in his favour, by virtue of Nivrutti being in possession as on 01-07-1960, Nivrutti had been granted occupancy rights under the Inam Act. In *Rangnath vs Daulatrao*, application for resumption

had been dismissed for tenant having been granted occupancy right on abolition of *inam*.

23. Relying on decision by Calcutta high court in *Friends' Bureau vs. The Corporation of Calcutta*, reported in *AIR 1980 Calcutta 57*, the appellate court considered that deceased Nivrutti being kept out of possession by due process of law, the period of limitation does not run against him and, therefore, there is no question of defendant no. 2 claiming adverse possession. Said decision by Calcutta high court is in respect of putting execution of decree on hold upon an order of stay by the court.

24. The appellate court as such held that the plea of adverse possession over red colour area is not available to defendant no. 2 and that he could not prove that he has acquired title by adverse possession to the same and held the plaintiffs to have title to the red colour portion and entitled to possession of the same along with defendant no. 4.

25. In the circumstances, appeal was allowed, decreeing the suit of the plaintiffs in respect of red colour area land as well. Aggrieved by said decision, defendant no. 2 and his legal representatives are before this court.

26. The decisions with regard to blue colour area by courts below do not appear to be subjected to challenge in present

appeal at defendant no. 2's instance. Thus, it would also be worthwhile to keep in mind that second appeal is confined to red colour area land in dispute in the suit.

27. Factual aspects which are not in dispute have been as referred to hereinabove, about orders of tenancy authorities for resumption of land to defendant no. 2; about defendant no.2 having been put in possession of said land pursuant to orders in proceedings under Tenancy Act; about grant of occupancy rights in plaintiffs' favour and about defendant no. 2's predecessor taking up proceedings against grant of occupancy rights in favour of plaintiffs' predecessor right upto the high court.

28. It so transpired in the interregnum, legal heirs of plaintiff no. 1 had purchased a portion of disputed property from red colour area from defendant no. 2 in 1990, to be precise a two acre piece of land under a registered sale. Said legal heir had subsequently transferred it to another legal heir. Subsequently, balance of red colour area land was sold in 2005 to one Dnyanoba Jyotiram Yadav and others and accordingly they have been put in possession and are joined in as appellants no. 1D to 1F in second appeal no. 14 of 1992 along with appellant-defendant no. 2 pursuant to orders on civil application no. 6798 of 2011 passed on 15-06-2011.

29. Appellants no.1D to 1F - Dnyanoba and others have filed civil application No. 15050 of 2015 for bringing before this court the transactions entered into by defendant no. 2 with them and in favour of sons of plaintiff no. 1 claiming the same to be under Order XLI, rule 27 of the Code of Civil Procedure, 1908.

30. Factual position with regard to aforesaid transactions not being in dispute, I deem it appropriate to grant civil application No. 15050 of 2015. Accordingly, said civil application is granted in terms of prayer clause (A) and stands disposed of.

31. Learned counsel Mr. Katneshwarkar on behalf of appellants submitted that the appellate court's judgment can be said to be strayed in the sense that the court had considered that against government there cannot be claim of adverse possession till expiry of a period of thirty years. He submits that this is an altogether foreign matter infused in the litigation and had been completely beyond the pleadings. The court ought not to have deflected the matter on such consideration which is not relevant. He submits that it is a question of adversity to the title of the plaintiffs, Government does not come in picture.

32. Mr. Katneshwarkar further submits that possession acquired under due process of law as contended by learned counsel for Plaintiffs Mr. Choudhari in 1961 had been rendered

adverse upon grant of occupancy rights and as such acquisition of possession by defendant no.2 and ousting of Nivrutti from possession, which is a dispossession, suit ought to have been filed within a period of twelve years from the date of such dispossession.

33. He submits that question of limitation will have to be viewed from the language employed in article 65 of the Limitation Act. Question, indeed, is whether the suit can lie after twelve years when possession of the defendant had become adverse to the plaintiff. According to learned counsel, assuming for the sake of argument that title was acquired by plaintiffs in 1965, the possession of defendant had started running adverse to plaintiff's title since then and under the circumstances, suit has not been instituted within twelve years from 1965, as required according to article 65 of the Act. Such a period stood expired in 1977 and since the suit is filed in 1981, the same is well outside the period of limitation and is as such barred.

34. He additionally submits that while right to possession accrued to the plaintiffs on the basis of title, until period of possession had expired pursuant to section 27 of the Limitation Act, the plaintiffs had not asserted the same. In view of the same suit itself had been barred by law of limitation.

35. He further submits that defendant No.2 had sufficiently exhibited his assertion of title over and above that of the plaintiffs by selling of a portion of property during life time of Nivrutti, the predecessor of the plaintiffs to whom occupancy rights were granted and he had not objected to assertion of rights in defiance of the one held by him under the occupancy right and had thus not litigated for possession during his lifetime.

36. The other leg of submissions on behalf of the defendants is that 1974 alienation has not been subject matter of challenge and further that during the course of litigation one of the legal heirs of plaintiff No.1 had entered into a transaction of purchase from defendant No.2. This according to the defendants shall seal the fate. It is submitted that, evidence shows that the plaintiffs themselves have accepted acquisition of title by defendant no.2 by adverse possession and for that matter, loss of their right to repossess the land by efflux of time. According to them, the plaintiffs now stand estopped from challenging title acquired by the defendants. Plaintiffs' legal heir once again dealt with property and sold it out to another legal heir, indicating that he has also accepted the title of defendants. Having regard to the same, according to them, the considerations which have weighed with the appellate court are rather strayed ones should

not subsume into acceptance of case not pleaded by the plaintiffs at all. It is, therefore, requested that the second appeal be allowed and the order and decree of the appellate court be set aside.

37. In support of his submission Mr. Katneshwarkar places heavy reliance on decision in *Ramiah Vs. N. Narayana Reddy* reported in (2004)7 SCC 541. This case, according to him, closely relates to present case and as such the present matter will have to be given similar treatment as has been given by the supreme court to situation in said case. He submits that a question about applicability of articles 64 and 65 had arisen for consideration in said matter that is about previous possession or title. Mr. Katneshwarkar submits that the case i.e. *Ramiah vs. N. Narayana Reddy* supra, supports on all fours his contention that suit ought to have been filed within twelve years from the date of dispossession.

38. Mr. Katneshwarkar, learned counsel appearing for appellant with reference to question no. 1 framed above submits that the matter will have to be viewed also from an angle that in the face of right of occupancy being claimed by plaintiff's predecessor which have been granted to him, coming into the possession of defendant No. 2 of the disputed red colour land may be under

the orders of the Tahsildar in some tenancy proceedings but taking into account the submissions on behalf of the plaintiff that the tenancy proceedings are rendered inefficacious and not affecting occupancy rights of the plaintiffs, such a possession is rendered illegal and unlawful. The coming into possession of defendant No. 2 and dispossession of the plaintiff under the orders which are rendered illegal the period of limitation for institution of suit for possession pursuant to such illegal dispossession would be covered by article 64 of the Limitation Act and suit having not been filed within twelve years from 20-04-1961 the suit is barred by law of limitation.

39. Learned counsel for appellants presses into service a decision in the case of *Nair Service Society Ltd. vs. K.C. Alexander* reported in *AIR 1968 SC 1165*, which in turn refers to observations in *Judicial Committed in Perry vs. Clissold, 1907 AC 73* which read thus:

" It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership as a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished and the possessory owner acquired an absolute title. "

40. Learned counsel submits that while occupancy rights were granted to plaintiff's predecessor and having regard to the judgment relied on by Mr. Choudhari that the Tenancy Act would

not apply in the face of land being Inam land, from the date of order or occupancy rights the plaintiff's predecessor had acquired title to the property and that defendant no.2 had challenged the occupancy rights and continued to remain in possession of the same in defiance of title acquired by plaintiff's predecessor. As such, from the date of occupancy rights in favour of predecessor of the plaintiff the possession which had been acquired under the Tenancy Act started running adverse to the title held by predecessor of plaintiff and that the suit has not been filed within twelve years from the date of acquisition of title and hostility exhibited by defendant no.2 to the same from day one. Under the circumstances having regard to Section 27 and Article 65 the suit is not within limitation and as such the suit stands barred by law of limitation.

41. Learned advocate further submits that submissions on behalf of the plaintiffs that the rights were crystallized on dismissal of the writ petition has no basis in fact and in law, for there was no interim relief operating during litigation nor it has been shown by the plaintiffs that there was ever any such relief being granted. He submits that the rights were declared and generally such declarations are seldom stayed under interim order. Thus, the title became available to the plaintiffs from the date on which occupancy rights had been granted and the same

having been resisted and denied by the plaintiffs is sufficiently eloquent to show defiance and hostility to title of plaintiff. Denial and hostility to title of plaintiff by defendant No. 2 is amply demonstrated by non acceptance of occupancy rights by plaintiff by proceeding against the orders passed by concerned authority. It has been expressly exhibited from day one after the order in favour of the plaintiff and was not allowed to be acted upon despite orders against defendant No.2. With expiry of twelve years from the date of first order of ownership rights in favour of the plaintiff, defendant No.2 became owner by adverse possession. The trial court has rightly considered that in the suit.

42. Mr. S. S. Choudhari, learned advocate appearing for original plaintiffs - respondents No.1 and 2 herein hints at and intends to submit that since the defendants have come lawfully in possession, it cannot be said that the same is adverse to the title or possession of the plaintiffs.

43. He contends that a plea of adverse possession cannot be said to be available to the appellants in the present matter, on account of variety of reasons. In the first place, entry into possession of disputed property of the appellants is under due process of law, pursuant to orders passed by the tenancy

authorities. In the circumstances, it cannot be said that the appellants have come in possession unlawfully.

44. Mr. Choudhari submits that the appellate court has rightly considered relevant aspects involved in the suit and ultimate outcome in the matter would not be affected at all. He submits that since defendant no.2 has failed to assert acquisition of title by adverse possession and much less has adduced any evidence and much much less has established ingredients required for claiming adverse possession as referred to in the decision by the Supreme Court in *Karnataka Board of Wakf (referred to in following paragraph no. 57)*, finding by the trial court about defendant no.2 having acquired title by title by adverse possession is absolutely untenable and tends to be perverse and having regard to the same, the suit by the plaintiff cannot be said to be outside the period of limitation.

45. Mr. Choudhari, learned advocate on behalf of respondents no. 1A and 1C heirs of original respondent no.1-plaintiff has tendered across a bunch of citations and from the same he refers to and relies on a few ones with a view to buttress and strengthen his submissions which are being discussed herein after.

46. In order to support his submission, he pressed into service a decision in the case of *Dhansing Rathod vs. Haji Abbubhai Kacchi*, reported in 2006(1) ALL M.R. 655, particularly, referring to paragraph 12 thereof. According to the learned counsel since the possession has been obtained by defendant no.2 under due procedure of law it should be deemed to be permissive possession and as such, possession howsoever long may be, can hardly be said to be adverse to that of the plaintiff.

47. He, for very same purpose, refers to yet another decision by learned Single Judge *Dharma s/o Tatua vs. Nathu Nakhate*, reported in 2006 (1) ALL M.R. 414. It appears, in said case it has been considered that possession howsoever long, cannot become adverse unless it is shown that it was peaceful and uninterrupted with assertion of hostile title for the statutory period of twelve years.

48. Learned counsel Mr. Choudhari further refers to a decision in the case of *Saraswatibai vs. Lila*, reported in 2014(3) Mh.L.J. 597 wherein it has been considered that a permitted possession cannot become adverse merely because of change in mental attitude of the person. It was in the facts of that case that father of the defendant had been let in possession of property under a lease and defendant appears to have asserted title by adverse

possession and further that the defendant had not examined himself nor had led any evidence of any witness for establishing ingredients of adverse possession and that the defendant had not conceded to title as owner of the land in the plaintiff. This case may, to some extent, assist the plaintiffs to further their case in order to negate claim of defendants no. 1 and 2 to acquisition of title by adverse possession.

49. The thrust of aforesaid citations relied upon is mainly on the aspect that a permissive possession, however long, cannot be said to run adverse to the title of the true owner and merely long possession would not be transformed into an adverse one because of the tenure of possession.

50. Mr. Choudhari also refers to the deposition of defendant No.2 in order to show that it cannot be said that there is any evidence regarding hostility to the title of the plaintiffs over the suit property and as such, claim of the defendants to have become owner by adverse possession does not stand in fact and in law. According to him, there is no evidence about hostility to the title of the plaintiffs.

51. He refers to a decision in the case of *Bhiva vs. State of Maharashtra* reported in 2004(3) *Mh.L.J.* 609, submitting that the Tenancy Act would not apply to *Inam* Land Act. Learned counsel

submits that it has been clearly held in said decision that no question of tenancy would be required to be decided because from and after the date of decision of conferring occupancy on a person, all the rights regarding tenancy come to an end. In the circumstances, it has been held in said decision that the issue with regard to Tenancy Act ought not to have been referred to the authorities. This decision has been cited for the purpose that resumption of land under tenancy proceedings has not been proper and has been illegal and the possession so obtained by defendant no.2 may be under the orders in tenancy proceedings, the same has no legal efficacy.

52. Another decision relied on by Mr. S. S. Choudhari is the case of *Tulsabai Tidke vs. Shri Maroti Deosthan Harbaji Maharaj Math* reported in 2012 (5) *Mh.L.J.* 708, wherein distinction has been considered between adverse possession and possession simplicitor and further that possession in order to be adverse must be hostile to the true owner and that there can be no adverse possession without hostile animus and that starting point of limitation begins from the expression of hostile animus amounting to denial of title of real owner to his knowledge and this must continue for uninterrupted period of twelve years.

53. He further refers to and relies on a decision in the case of *Champat Ganpatrao Ganjre vs. Mahadeo s/o Bhagwan Umak*, reported in 2003 (3) ALL MR 235, wherein it has been considered that in case plea of adverse possession is raised, the person has to set up hostile title against the true owner and that mere longstanding possession by itself would not be sufficient to hold that a person has earned title by adverse possession and further with reference to a decision of the supreme court reported in 1996 (8) SCC 128, *Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others*, it has been held that a person pleading adverse possession since tried to defeat rights of true owner, it is for him to clearly plead and establish all the facts necessary to demonstrate his adverse possession. Learned counsel Mr. Choudhari, with reference to this ratio contends that no specific pleas are appearing either in written statement as to from which date possession by defendant no. 2 is being enjoyed by defendant no. 2 with hostility against true owner-the plaintiff, nor there is any evidence in this respect. In the circumstances, claim by defendant no. 2 as well as finding by the trial court are absolutely untenable.

54. Another leg of submissions of Mr. Choudhari is that Article 64 of the Limitation Act, in the facts and circumstances of the case would not have any application, for, it cannot be said that

the plaintiffs had ever been dispossessed by employing fraud or by force or that they had been driven out.

55. Mr. Chaudhari relies on yet another judgment in the case of *Khandu Shankar Choudhari vs Yeshwant Dhaku Khatri*, but has provided copy of the same Reported in 2011 (4) LJSOFT 137 = 2011 (4) ALL MR 358. He particularly refers to and relies on paragraph no. 10 in the same which reads :-

" 10. *The suit under Article 64 must be brought within 12 years from the date of dispossession. As such, for applicability of Article 64 of the Limitation Act, the prima donna requirement is that the plaintiff should be dispossessed, or should discontinue possession. The expression "dispossession" applies when a person comes in and drives out another from possession. It imports ouster, i.e. driving out of possession against the will of a person in actual possession. This driving out cannot take place when the transfer of possession was voluntary i.e. to say not against the will of person in possession, but in accordance with his wishes and active consent. Dispossession implies some amount of force or fraud. As such, unless it is shown that the plaintiff was dispossessed by force or by fraud, Article 64 of the Limitation Act would not be applicable. If the plaintiff on his own volition and voluntarily handed over his property, that would not come within the ambit and purview of the expression "dispossession" inter alia Article 64 would not be applicable in such a case. "*

56. It is being submitted that it cannot be said that the present case is governed by Article 64, for, necessary ingredients especially that the plaintiff has been put out of possession under

some force or fraud are not available to defendant no.2 since plaintiff's predecessor had to discontinue possession under due process of law. Mr. Choudhari, therefore submits that Article 64 would not have any application in present matter.

57. Lastly, Mr. Choudhari refers to and relies on a decision of Supreme Court in the case of *Karnataka Board of Wakf vs. Government of India* reported in *Law Finder Doc ID #71670=2004 (10) SCC 779*, in which it has been discussed by the Supreme Court that physical fact of exclusive possession and *animus possidendi* to hold as owner in exclusion to actual owner are the most important factors that are to be accounted in cases of this nature and further that adverse possession is not a plea of law but a blended one of fact and law.

58. According to Mr. Choudhari, none of the aforesaid ingredients can be said to have been satisfied by defendants in the present case in their pleadings. Under the circumstances acquisition of title under a plea of adverse possession is absolutely not available to defendant no.2.

59. Alternatively, according to learned advocate, defendant No.2 had not accepted occupancy rights of the plaintiffs and had proceeded against the same, which culminated into order of

dismissal of writ petition filed by defendant No.2. In the circumstances, it is the contention of Mr. Chaudhary , that rights in respect of property shall be deemed to have been finally crystallized in 1970 and since then at the most it can be considered that possession of the defendants had become adverse to the interest of plaintiffs and suit is obviously filed within twelve years from 1970.

60. On facts, case referred to by learned counsel Mr. Katneshwarkar i.e. *Ramiah vs. N. Narayana Reddy* appears to be different. In the present second appeal there is dispossession of plaintiff's predecessor that was under the orders of authorities, and as such, it cannot be said that Article 64 is invocable in facts of the case and aforesaid case cited would hold present matter.

61. While possession is taken in 1961 itself on 20th April, it was under tenancy proceedings and defendant No.2 had not accepted title of the plaintiffs over suit property. Orders passed under Inam Abolition Act had been resisted by him and that has been quite amply exhibited by him by filing proceedings against granting of occupancy rights. It was a clear indication of and/or it shall be considered and deemed and, in fact underlying intention had always been to deem defendant No.2 as

owner despite title being conferred upon Nivrutti under the Inam Abolition Act.

62. Defendant no. 2 had been put in possession of suit property on 20-04-1961 and plaintiffs' predecessor had acquired title to said property under the Inams Act and had accordingly paid price therefor.

63. The case as considered by the appellate court in respect of government's position is of little consequence and has no relevance in the present controversy. The considerations which have weighed with the appellate court were not germane and so the reasons for consideration with reference to government are slippery and would not be able to stand. It is neither case pleaded nor canvassed as appearing from record. It was not case of any party including government though government is a party to litigation.

64. From the facts as those occur, it also emerges that defendant no. 2 had claimed title and possession over suit property in his own right. Plaintiffs' predecessor also acquired title to the suit property which would prevail. On acquisition of title to suit property, plaintiffs' predecessor as a title holder had become entitled to possession of suit property. Defendant no. 2 who was already in possession even after acquisition of title by

plaintiffs' predecessor, and continued to assert title to the property in defiance of title acquired by plaintiffs' predecessor. The character of the possession of defendant no. 2 as such had started running adverse to the interest and title of the plaintiffs' predecessor over suit property. However, neither during his lifetime the predecessor of the plaintiffs had asserted right to suit property nor had he ever objected to dealing with the property by defendant no. 2 in favour of defendant no. 3. He had preferred to remain inert in respect of suit property and eventually allowed the period of twelve years to expire from the date of acquisition of title to the property from which date title over suit property as considered by defendant no. 2 in his own right had been running adverse to interest and title of plaintiffs' predecessor.

65. Regard may be had to section 27 of the Limitation Act, 1963 which reads as under;

*" 27. **Extinguishment of right to property.**- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. "*

Having not initiated any proceedings for more than 12 years after acquisition of title by plaintiffs' predecessor and possession of defendant no. 2 running adverse to the same, the plaintiffs' predecessor had lost right to recovery suit property. The suit

is, under the circumstances, beyond period of twelve years of limitation as referred to under article 65 of the Limitation Act which reads as under;

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>For possession of immovable property or any interest therein based on title.</i> <i>Explanation.- For the purpose of this article-</i> <i>(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;</i> <i>(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;</i> <i>(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.</i>	<i>Twelve years</i>	<i>When the possession of the defendant becomes adverse to the plaintiff</i>

66. Thus, the latest date on which occupancy rights can be said to have been conferred is around 1965 when occupancy price was paid by predecessor of the plaintiffs and which would be the latest starting point for running the period of limitation. Defendant No.2 continued to defy title of the plaintiffs who had been put in possession under orders of tahsildar and as such, his said possession had been running hostile to the title claimed by the plaintiffs, over a period of twelve years, since then.

67. Over and above this, the parties to the suit have also dealt with the suit property acquiescing into the rights claimed by defendant no. 2 over suit property and have entered into transaction as referred to hereinbefore. In view of this scenario, suit for possession of red colour area with reference to title by plaintiffs is unsustainable not only for being outside the period of limitation but also having regard to aforesaid circumstances.

68. Substantial question as such stands answered accordingly. Second Appeal is allowed. The impugned judgment and decree passed by appellate court (District Judge, Osmanabad) in regular civil appeal no. 43 of 1994 delivered on 25-11-1991 is set aside. Consequently, judgment and decree by the trial court (Civil Judge, Senior Division, Osmanabad) on 31-08-1983

dismissing suit bearing special civil suit No.16 of 1981 filed by present respondents no. 1 and 2 is confirmed.

69. All civil applications stand disposed of accordingly.

SUNIL P. DESHMUKH, J.

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